Supreme Court, U.S.
FILED
FEB 10 2004
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No. 02-1624

In the Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT AND
DAVID W. GORDON, SUPERINTENDENT,
PETITIONERS

v.

MICHAEL A. NEWDOW, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE SEATTLE ATHEISTS, SECULAR COALITION FOR AMERICA, ATHEIST COMMUNITY OF AUSTIN, AND INSTITUTE FOR HUMANIST STUDIES, IN SUPPORT OF RESPONDENT

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February 10, 2004

QUESTION PRESENTED

Whether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment.

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INTEREST OF AMICI [1]

Amicus Seattle Atheists is a nonprofit educational and charitable organization formed to develop and support the atheist, secular humanist, agnostic, and other freethinker communities. Seattle Atheists also provides fellowship for those groups, protects the first amendment principle of state-church separation, opposes discrimination based upon religious conviction, particularly when it is directed at the non-religious; and works with other organizations in pursuit of common goals.

Amicus Secular Coalition for America is a lobbying organization whose purpose is to amplify the diverse and growing voice of the non-theistic community in the United States. Our sponsoring and honorary member organizations are leaders in the national freethought movement who have come together to formalize a cooperative structure for visible, unified activism to improve the civic situation of all American citizens whose worldview is naturalistic. The Secular Coalition for America is committed to securing the First Amendment's guarantee of freedom from religious establishment in public schools and the elimination of state-sponsored rituals conditioning students to associate public service or patriotism with theistic belief thereby adding to the social and political disenfranchisement of nonbelievers and minority religious views.

Amicus Atheist Community of Austin is organized as a nonprofit educational corporation to develop and support the atheist community, to provide opportunities for social-

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[1] This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court. Pursuant to Rule 37.6, amici discloses that no counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than amici curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

izing and friendship, to promote atheist viewpoints, to encourage positive atheist culture, to defend the First Amendment principle of state-church separation, to oppose discrimination against atheists, and to work with other organizations in pursuit of common goals. The organization operates in an open, democratic manner, without discrimination as to gender, race, age, sexual orientation, ethnic origin, nationality, or disability.

Amicus Institute for Humanist Studies ("IHS") promotes greater public awareness, understanding, and support for humanism. The Institute specializes in pioneering new technology and methods for the advancement of humanism. Founded in 1999 as an educational non-profit institute, the IHS provides accessible and authoritative information about humanism and the non-religious to the media, academia, and the general public.

Many of the members of the Amici have children in public schools in the Ninth Circuit and other federal circuits. Amici seek to end governmental inculcation of children in public schools with religious assertions veiled as a patriotic exercise. Amici also seek to restore our Pledge of Allegiance to the form which all Americans may once again freely enjoy as a patriotic exercise without governmental promotion of the claim of the existence of one god and without ostracizing of those who believe in the existence of many gods or those who don't believe in any gods.

SUMMARY OF ARGUMENT

The Establishment Clause proscribes governmental promotion of one religion over other religions or over non-belief. That proscription applies whether the favored religion is premised on a specific deity, just one version of a specific deity, or a generic monotheistic deity. Any attempt to create a governmental "neutral deity" would be futile in a religiously diverse society such as ours. Governmental promotion of belief in a single deity excludes those who believe in many deities, excludes those who have a religion that is not premised on a deity, and excludes those who do not believe in any deities.

Daily affirmation of the existence of a specific monotheistic God, or even a generic monotheistic god, is a religious affirmation even if it is draped in the Flag. Thus, a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance with the phrase "under God" violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment, under the three-pronged test set forth in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), the "endorsement" test, of *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'-Connor, J. concurring), and *County of Allegheny v. ACLU,* 492 U.S. 573 (1989), and the "coercion" test of *Lee v. Weisman,* 505 U.S. 577 (1992), and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

Petitioners' attempt to avoid the Establishment Clause violation by characterizing the phrase "under God" as mere ceremonial deism is disingenuous in light of the history of the insertion of that phrase into the Pledge, the purpose for which the Pledge is recited daily by elementary school children, and the specific reference to "God." The phrase "under God" does not qualify as mere ceremonial deism when included in a daily teacher-led recitation of the

Pledge of Allegiance by public school elementary students. It is a government sponsored claim of the existence of a single deity that excludes believers in all other deities and excludes those who do not believe in any deity.

Moreover, ceremonial deism is a constitutional oxymoron. Whatever validity it might have had when first proposed, it is now an archaic concept for purposes of constitutional jurisprudence in light of the ever-increasing religious diversity of the citizens of the United States. As such, it deserves a burial in the same graveyard as the doctrine of "separate but equal" and the notion that women are not fit "for many of the occupations of civil life." Compare *Plessy v. Fergson*, 163 U.S. 537 (1896) with *Brown v. Board of Education*, 347 U.S. 483 (1954), and compare *Bradwell v. State*, 83 U.S. 130 (1873) with *Reed v. Reed*, 404 U.S. 71 (1971).

The Court did not adhered to the *Bradwell* 1873 view of women when it decided *Reed* in 1971. The Court did not feel chained to the *Plessy* 1896 doctrine of separate but equal when it decided *Brown* in 1954. Likewise, the Court should hold that ceremonial deism no longer withstands constitutional scrutiny when the intent of the First Amendment is applied in the light of the full development of the diversity of religious beliefs and non-beliefs, giving due consideration to their "present place in American life throughout the Nation." *Brown v. Board of Education*, 347 U.S. 483, 492-493 (1954).

In 1791 daily allusion to a monotheistic god by government may not have seemed any more peculiar than separate railroad cars in 1896, or the notion that women were not fit to be attorneys in 1873. But in the America of the twenty-first century, the inculcation of public school students with a daily affirmation of the existence of a monotheistic God, with the resulting exclusion of all other beliefs

and non-beliefs, does not withstand the application of the guiding principles of the Establishment Clause.

ARGUMENT

I. The Establishment Clause prohibits government endorsement of a particular deity such as Jesus or Allah, as well as government endorsement of a monotheistic god.

The Court has repeatedly held that the Establishment Clause proscribes religious proclamation activities by public school administrators that are aimed at students: "School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are non-adherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 310 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). Thus, if teacher-led daily recitation of the Pledge of Allegiance with the words "under God" amounts to "school sponsorship of a religious message" then it is proscribed by the Establishment Clause.

The words "under God" refer to a monotheistic deity and exclude all other deity beliefs and non-belief in any deities. Even if viewed as a generic reference to a monotheistic god, it still is a broad exclusion of polytheistic religions, non-deity centered religions, and non-belief in any and all deities. It claims that "We" in "We the people" refers only to monotheists and excludes polytheists or non-believers. It does so not merely as an historical claim, but also as a contemporaneous assertion. As such it is clearly a religious message.

The Court has consistently held that the Establishment Clause prohibits the government from promoting one sect of Christianity over another, from promoting one version of the monotheistic God over other versions, from promoting

a monotheistic God over polytheistic gods, and from promoting any god or gods over no belief in any god or gods.

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.

Everson v. *Board of Education* 330 U.S. 1, 15 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879)).

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs (footnotes omitted).

Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

The restriction placed on government activity in contravention of the Establishment Clause cannot be overcome by governmental assertion of a so-called "neutral belief" because such a belief is still an assertion of a belief in opposition to all other beliefs and non-beliefs. "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause." *Engel v. Vitale*, 370 U.S. 421, 430

(1962). Thus, the Establishment Clause prohibits the government from promoting any combination of beliefs over non-belief, as well as promoting a particular belief over other beliefs. When such a promotion is foisted upon public school children by public school administrators, it is a clear violation of the Establishment Clause under the *Lemon* test (*Lemon v. Kurtzman,* 403 U.S. 602, (1971)) the "endorsement" test (*County of Allegheny v. ACLU,* 492 U.S. 573 (1989)), and the "coercion" test (*Lee v. Weisman,* 505 U.S. 577 (1992) and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)). Absent an exception to the forgoing rules, the inculcation of public school elementary children with the notion of "one Nation, under God" does not pass constitutional muster.

II. The phrase "under God" does not qualify as "ceremonial deism" when said by a public school teacher leading elementary students in the daily recitation of the Pledge of Allegiance.

The phrase "ceremonial deism" lacks a universal definition. It was coined by former Yale Law School Dean Walter Rostow in a lecture given at Brown University in 1962. The first published reference to Rostow's phrase appeared in a footnote of a book review by Professor Arthur E. Sutherland of Harvard University Law School. *See* Sutherland Book Review, 40 Ind. L.J. 83, 86 n. 7 (1965), in which Professor Sutherland stated: "constitutional tolerance of the opening prayers in the Congress would require some other theory - possibly the idea that another class of public activity, which the Dean of the Yale Law School recently called 'ceremonial deism' can be accepted as so conventional and uncontroversial as to be constitutional." *Id.* at 86 (quoting Dean Rostow from memory). *See also* Epstein, S.B., *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083 (1996).

Justice Brennan introduced the Court to the phrase in his dissenting opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984) when he said:

> Finally, we have noted that government cannot be completely prohibited from recognizing in its public actions the religious beliefs and practices of the American people as an aspect of our national history and culture. While I remain uncertain about these questions, I would suggest that such practices as the designation of "In God We Trust" as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow's apt phrase, as a form of "ceremonial deism," protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.

Id. at 716 (internal citations and footnote omitted).

Its only other appearance was in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), where Justice Blackmun, in a footnote to his majority opinion, in explaining legislative prayer as constitutional in *Marsh v. Chambers*, 463 U.S. 783 (1983), said: "The function and history of this form of *ceremonial deism* suggests that 'those practices are not understood as conveying government approval of particular religious beliefs.'" 492 U.S. at 595-96 n. 46 (quoting *Lynch* at 717) (emphasis added). Justice Blackmun also used the term to differentiate crèche displays from references to God in the motto and the Pledge of Allegiance. *See* 492 U.S. at 603.

Justice O'Connor, in her concurring opinion in *County of Allegheny*, explained ceremonial deism as follows:

> Justice Kennedy submits that the endorsement test is inconsistent with our precedents and traditions

because, in his words, if it were "applied without artificial exceptions for historical practice," it would invalidate many traditional practices recognizing the role of religion in our society. This criticism shortchanges both the endorsement test itself and my explanation of the reason why certain long-standing government acknowledgments of religion do not, under that test, convey a message of endorsement. Practices such as legislative prayers or opening Court sessions with "God save the United States and this honorable Court" serve the secular purposes of "solemnizing public occasions" and "expressing confidence in the future," . . .. These examples of *ceremonial deism* do not survive Establishment Clause scrutiny simply by virtue of their historical longevity alone. Historical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause, just as historical acceptance of racial or gender based discrimination does not immunize such practices from scrutiny under the Fourteenth Amendment.

492 U.S. at 630 (internal citations omitted and emphasis added). The Court, however, has never directly applied the concept of ceremonial deism to a teacher-led daily recitation of the Pledge of Allegiance by elementary public school children.

The best that can be said from the sparse Supreme Court jurisprudence regarding ceremonial deism is that the integration of religious symbols, practices, and assertions into our government ceremonies is constitutionally acceptable if we can conclude that they have become so trivial that they no longer qualify as religious symbols, practices, or assertions. Those matters are trivial when they have become, by the passage of time, so uncontroversial that they

have lost their religious significance and can be freely taken for use by government.

If taken literally, "ceremonial deism" suggests that the beliefs of Deists are not worthy of protection from government usurpation under the Establishment Clause. Deism is a sincere belief that has existed in the United States from the birth of this nation. Suggesting that it, unlike any other belief, can be trivialized or secularized for use by government is itself a violation of the principles underlying the Establishment Clause. The respect for religious beliefs engendered by the Establishment Clause would be equally violated by secularizing Catholic, Protestant, Islamic, Jewish, Hindu, or Sikh beliefs and practices to the point where "they have lost through rote repetition any significant religious content." *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J. dissenting). Thus, we must eliminate the Deist from ceremonial deism if that concept is to pass constitutional muster.

A more accurate description of the concept might be "ceremonial god assertion." In other words, references to a generic god are constitutionally valid so long as they are so trivial as to be meaningless in a religious sense. The Pledge of Allegiance, however, does not refer to a generic god. Rather, it refers to a very specific God, a god with a capital "G." Thus, whatever ceremonial god assertion might be, it certainly is not represented by the inclusion of the phrase "under God" in a daily teacher led recitation of the Pledge of Allegiance by public school elementary students. Including the phrase "under God" in such a daily recitation does not qualify as mere ceremonial deism because it contains significant religious content, it is unquestionably controversial, and it does not have an established history.

"Under God" contains significant religious content.

The legislative intent of inserting "under God" into the Pledge was clearly religiously oriented, as shown by its legislative history:

> At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.

H.R. Rep. No. 83-1693, at 1-2 (1954), reprinted in 1954 U.S.C.C.A.N. 2339, 2340. Upon signing the bill President Eisenhower declared: "From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty."[2]

Moreover, the phrase "under God" leaves no doubt in the minds of those who believe in "God" that it is a reference to their particular god. But that phrase also leaves no doubt in the minds of those who believe in more than one god that it does not reflect their beliefs. And the phrase "under God" leaves no doubt in the minds of those who

[2] 100 Cong. Rec. 7, 8618 (June 22, 1954) (Statement by President Dwight D. Eisenhower, as reported by Sen. Ferguson.)

don't believe in any god or gods that it does not reflect their non-beliefs. More importantly, it is not a mere recognition of the relationship of the history of the United States with respect to that "God". It is also an assertion that such a "God" exists and that the United States is "under" that "God" to the exclusion of all other gods and in contravention of non-belief in any god or gods. It gives comfort to those who believe in that "God" and it belittles the beliefs and non-beliefs of those who don't. It is a religious message because of its affirmative, exclusionary assertions.

The "under God" phrase is controversial.

"Under God" in the Pledge is controversial, even for Justices of the Supreme Court. "I frankly do not know what should be the proper disposition of...'One Nation Under God,' and the like." *Marsh v. Chambers*, 463 U.S. 783, 818 (1983) (Brennan, J., dissenting). It is even more controversial for members of Congress, the President, and the public. As reported by ABC news[3], the lower court's opinion in this case ignited a firestorm of criticism. President Bush dismissed the decision as "ridiculous." The Democratic Senate majority leader Tom Daschle called the decision "just nuts." Senate Minority Leader Trent Lott, called the opinion "stupid." The Senate then proceeded to vote 99-0 (Senator Helms was ill) denouncing the court and instructing Senate lawyers to file a brief seeking reversal of the decision. The House of Representatives voted in favor of a similar resolution by a vote of 416-3.

Such intense controversy is all the more reason why the inclusion of "under God" in the daily recitation of the Pledge by public school elementary students is not to be left to majority vote. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of

[3] Reprinted on ABCNews.com at http://abcnews.go.com/sections/politics/DailyNews/political_020626.html (June 26, 2002)

political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts." *Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

"Under God" in the Pledge is not rooted in history.

The phrase "ceremonial deism" assumes that the activity has roots in a long and well established history in our societal or government practices. The current pledge, however, is only fifty years old, and the original version was in use much longer. At best, the current version is nothing more than a recent corruption of an historical practice.

Petitioners also claim that "under God" simply acknowledges the role of religion in our nation's history. That purpose is not evident to children reciting the Pledge, because the Pledge is a present-day activity, not a history lesson. Students pledge themselves to one nation that *is* "under God," not to one nation that *was* "founded by individuals that considered themselves to be under God." Public school children say the Pledge as their assertion of their commitment to their country. They do not say the pledge as if they were merely reading a historical document. The words "under God" can not be understood by a reasonable observer, let alone a child, as simply an acknowledgement of historical events.

III. Ceremonial deism is an archaic constitutional concept that should be buried alongside the doctrine of "separate but equal."

Even if ceremonial deism may have been a constitutionally acceptable concept in the past, the existing religious landscape of the United States has rendered it constitutionally archaic. There is nothing surprising about the lack of controversy over a non-denominational legislative prayer in 1791 given that the Framers were overwhelmingly monotheists, and in particular Christian monotheists.

Today, however, we are a nation of many religions that worship a variety of monotheistic and polytheistic deities, melted into a society with people whose religious beliefs have no deities, and people who don't believe in any religion or deities. The majority, however, may not realize, or may not be willing to recognize, that the United States is no longer a nation of likeminded believers:

> I sense in some of the most strident Christian communities little awareness of this new religious America, the one Christians now share with Muslims, Buddhists, and Zoroastrians. They display a confident, unselfconscious assumption that religion basically means Christianity, with traditional space made for the Jews. But make no mistake: in the past thirty years, as Christianity has become more publicly vocal, something else of tremendous importance has happened. The United States has become the most religiously diverse nation on earth.

Eck, Diana L., *A New Religious America: How a Christian Country Has Become The World's Most Religiously Diverse Nation*, 4 (Harper San Francisco, 2002). Contrary to popular belief, the blossoming religious diversity of our country is not limited to just an increase in the several hundred versions of Christianity. The United States has also experienced significant increases in the number of other monotheistic religions, polytheistic religions, non-deity centered beliefs, and non-believers.

The most recent comprehensive surveys on religious identification in the United States were done in 1990 and 2001 by sociologists Barry A. Kosmin, Seymour P. Lachman, and associates at the Graduate School of the City University of New York. Their first major study, the National Survey of Religious Identification (NSRI), was done in 1990. In 2001 they completed the American Religious

Identity Survey (ARIS), with a sample size of 50,000 Americans.[4] The ARIS survey found that:

> The question "what is your religion, if any?" generated more than a hundred different categories of responses.
>
> In 1990, ninety percent of the adult population identified with one or another religion group. In 2001, such identification had dropped to eighty-one percent.
>
> The proportion of the population that can be classified as Christian has declined from eighty-six in 1990 to seventy-seven percent in 2001.
>
> The greatest increase in absolute as well as in percentage terms has been among those adults who do not subscribe to any religious identification; their number has more than doubled from 14.3 million in 1990 to 29.4 million in 2001; their proportion has grown from just eight percent of the total in 1990 to over fourteen percent in 2000.
>
> There has also been a substantial increase in the number of adults who refused to reply to the question about their religious preference, from about four million or two percent in 1990 to more than eleven million or over five percent in 2001.

The ARIS research also found that there was a significant increase in the religious diversity of the U.S population between 1990 and 2001:

> The number of Muslims in the United States has more than doubled since 1990, from 527,000 to 1,104,000.

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[4] American Religious Identity Survey (ARIS)" data is published at http://www.gc.cuny.edu/studies/aris_index.htm.

> The number of Buddhist has multiplied by a factor of more than 2.5 since 1990, growing from 401,000 to 1,082,000.
>
> The Hindu population of the United States has nearly tripled since 1990, going from 227,000 to 766,000.
>
> Sikhs have more than quadrupled from 13,000 in 1990 to 57,000 in 2001.
>
> Wiccans have increased 16 fold, from 8,000 in 1990 to 134,000 in 2001.

When the Founding Fathers spoke of a god it was with a capital "G," and they meant their monotheistic God premised largely on the Christian God. If the United States was as religiously diverse in 1791 as it is now, then the practice of saying a Christian prayer in the legislative sessions of 1791 would have been very controversial. Today, when public school teachers lead elementary school students in the Pledge, the words "under God" exclude millions of citizens from the phrase "We the people0" be they Hindus, Buddhists, Wiccans, Secular Humanists, Atheists, or any other American who does not subscribe to the monotheistic God of the Framers:

> The religious composition and habits of contemporary America are so radically different from those at the time of the founding that using the founding as a baseline is a non sequitur. At the time of the founding, nearly one hundred percent of the nation's citizens were Christian, and most of them were Protestant. Established churches existed in ten of the thirteen colonies, four of which continued those establishments well beyond the adoption of the First Amendment; blasphemy and Sabbath laws were in place everywhere. (Internal footnotes omitted.)

Epstein, S.B., *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2158 (1996).

Our Constitution is not static. Were it otherwise, we could not have evolved from the constitutionality of the separate but equal doctrine, as held in *Plessy v. Fergson*, 163 U.S. 537 (1896), to the concept of equality expressed in *Brown v. Board of Education*, 347 U.S. 483 (1954).

> The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.

Plessy v. Fergson, *id.* at 544.

> In approaching this problem, we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Brown v. Board of Education, *id.* at 492-493.

A similar metamorphose occurred with regard to the constitutional rights of women, as exemplified by comparing *Bradwell v. State*, 83 U.S. 130 (1873) with *Reed v. Reed*, 404 U.S. 71 (1971).

> The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The paramount destiny and mission of women are to fulfill

> the noble and benign offices of wife and mother. This is the law of the Creator.

Bradwell v. State, 83 U.S. 130, 141 (1873) (concurring opinion of Swayne, J.).

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

Reed v. Reed, 404 U.S. 71, 76-77 (1971).

Thus, the question is not "what *did* the Founding Fathers do" in a largely monotheistic society, but rather, "what *would* the Founding Fathers do" in the religiously diverse American society of today. The principles upon which they based the First Amendment do not allow for the inculcation of public school students with a teacher-led daily affirmation of the existence of a monotheistic God in an exercise of patriotic expression that excludes such a large number of American citizens from "We the People of the United States" on the basis of their religious belief or non-belief.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted

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